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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM 1996**

STATE OF NEW JERSEY,
*Petitioner*,

vs.

ERIC WOMACK,
*Respondent*.

**On Petition for Writ of Certiorari**
**to the Supreme Court of New Jersey**

# PETITION FOR WRIT OF CERTIORARI

PETER VERNIERO
*Attorney General of New Jersey*
CAROL M. HENDERSON
*Deputy Attorney General*
*Attorney of Record*
DIVISION OF CRIMINAL JUSTICE
R.J. HUGHES JUSTICE COMPLEX
CN 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

October 22, 1996

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## QUESTIONS PRESENTED

1. Whether a civil penalty which is not disproportionate to the government's damages and costs bars a subsequent criminal prosecution on double jeopardy grounds if there was a "punitive intent" to the penalty.

2. Whether the order of the criminal and civil proceedings has any significance in determining the existence of a double jeopardy violation under *United States v. Halper*.

## PARTIES BELOW

The State of New Jersey, by the Attorney General of New Jersey, is the petitioner in this case. The respondent is Eric Womack.

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**No. ___**

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**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

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The Attorney General of New Jersey, on behalf of the State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this case on July 25, 1996.

## OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, is not reported. It is reprinted as App. B, *infra*, pp. 14a-31a.

The opinion of the Supreme Court of New Jersey is reported at 145 *N.J.* 576, 679 *A.*2d 606 (1996), and is reprinted as App. A, *infra*, pp. 1a-13a.

## JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 25, 1996. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(a).

## CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of *N.J. Stat. Ann.* 2C:21-20, 45:1-14, 45:1-23, 45:1-25, 45:9-18, and 45:9-22 are reprinted as Appendices H - M, *infra*, pp. 49a-53a.

## STATEMENT OF THE CASE

On June 15, 1993, the New Jersey Attorney General's Office, on behalf of the State Division of Consumer Affairs, filed a verified complaint charging respondent (hereinafter defendant), Eric Womack, with the unlicensed practice of

medicine in violation of the Medical Practices Act, *N.J. Stat. Ann.* 45:9-1 *et seq.* (West 1991). The State sought an order enjoining defendant from engaging in the unlicensed practice of medicine, and a judgment for civil penalties and costs pursuant to *N.J. Stat. Ann.* 45:1-25 (West 1991). App. D, *infra*, at pp. 34a-38a. A temporary restraining order was entered when the complaint was filed. App. E, *infra*, at pp. 39a-42a. On June 17, 1993, an investigator employed by the New Jersey Division of Consumer Affairs filed a criminal complaint against defendant.

On July 2, 1993, the state court issued an Order Modifying Restraints that permanently restrained and enjoined defendant from engaging in the practice of medicine. App. F, *infra*, at pp. 43a-46a. On November 16, 1993, the court filed a Consent Order that incorporated the provisions of the July 2, 1993 order, and imposed civil penalties and investigative costs totalling $8,554.07. App. G, *infra*, at pp. 47a-49a. In this regard the Order provided:

> 2. Defendant Eric Womack shall pay to the State of New Jersey the sum of $5,000.00 in civil penalties and $3,554.07 in investigative costs, plus interest as provided by R. 4:42-11, for the offenses alleged in the complaint and for holding himself out as eligible to treat, offering to treat and actually treating persons not named in the Complaint for physical ailments and illnesses.

On December 2, 1993, an Essex County Grand Jury

returned Indictment No. 4152-12-93 charging defendant with practicing medicine without a license, a third-degree crime, in violation of *N.J. Stat. Ann.* 2C:21-20 (West 1995). App. C, *infra*, at pp. 32a-33a.

Prior to trial, defendant moved to dismiss the indictment on the grounds that the indictment was barred by the Double Jeopardy Clause of the United States Constitution. On September 23, 1994, the trial court concluded that the indictment was barred on double jeopardy grounds, and accordingly dismissed it with prejudice.

On May 15, 1995, the Superior Court of New Jersey, Appellate Division, reversed the order of the trial court and found that double jeopardy did not require a dismissal of the instant indictment. In so doing, the Appellate Division correctly discerned that the costs and penalties totalling $8,554.07 assessed against defendant in the civil matter prior to his indictment were not so disproportionate to the aggregate expenses incurred by the State in the civil action as to constitute punishment for purposes of double jeopardy. App. B, *infra*, at pp. 14a-31a.

On July 25, 1996, the Supreme Court of New Jersey issued its opinion in which it reversed the Appellate Division decision reinstating the indictment, notwithstanding the court's finding that the $5,000 penalty imposed in the civil proceedings did "not approach the grossly disproportionate level and is rationally related to the costs necessary to compensate the State." *State v. Womack*, 145 *N.J.* 576, 584, 679 *A.*2d 606, 610 (1996); App. A, *infra*, p.6a. The court found that the amount of the civil penalty was indicative of a remedial purpose but it was troubled by the language in the civil judgment which divided the penalty into "investigative

costs" and "civil penalty." *Id.*[1] The court noted that "had the civil penalty been imposed as a single and indivisible lump-sum fine, and not been divided into two parts labelled 'civil penalty' and 'investigative costs,' ... the *Halper* standard would support a finding that the fine was simply remedial in nature." *Id.*, 145 *N.J.* at 584, 679 *A.*2d at 609; App. A, *infra*, p.6a.

The court went on to find that double jeopardy would bar the criminal prosecution if it was the intention of the parties at the time of the civil judgment to punish defendant. The court held that a remand was necessary to determine the intent of the parties at the time the civil penalty was imposed. "If it is clear that the intent of the State and the court at the time the fine was imposed was to punish defendant, then double jeopardy would bar this criminal action." *Id.*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, p.7a.

The New Jersey supreme court then provided a remedy for removing the double jeopardy obstacle. The court held that even if the civil penalty imposed on defendant was intended to be punitive, the State might be able to avoid the double jeopardy bar if it could return the punitive portion of the civil fine. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, p. 8a. The court held that "[i]f the State is able to return to the trial court that entered the judgment and alter or amend the consent judgment so as to eliminate the punitive

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[1]There was a dispute between the parties as to whether the trial prosecutor, at oral argument on the motion to dismiss, conceded that the $5,000 penalty was punishment. The state court found that "although the prosecutor's concession at oral argument below that the fine was punitive is not dispositive of the issue, the concession indicates that, at the very least, the prosecutor understood the sanction to have a punitive purpose." *State v. Womack*, 145 *N.J.* at 584, 679 *A.*2d at 609; App. A, *infra*, p. 6a.

portion of the civil penalty and if the State returns that portion to defendant, the double jeopardy bar to this action would be lifted." *Id.*, 145 *N.J.* at 585-586, 679 *A.*2d at 610; App. A, *infra*, p. 8a.

The New Jersey supreme court also rejected the State's argument that even if the civil fine was punitive, there was no bar to the subsequent criminal action because the Double Jeopardy Clause bars only civil prosecutions after criminal penalties, not criminal prosecutions after civil penalties. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, p. 7a. The state court instead found that the order of the civil and criminal proceedings is not material in determining a double jeopardy violation. *Id.*

## REASONS FOR GRANTING THE PETITION

This case presents important questions under the Double Jeopardy Clause which are necessarily implicated by this Court's decision in *United States v. Halper*, 490 *U.S.* 435 (1989) and have been left unresolved by the subsequent decisions in *Department of Revenue of Mont. v. Kurth Ranch*, 511 *U.S.* ___, 114 *S.Ct.* 1937 (1994), and *United States v. Ursery*, ___ *U.S.* ___, 116 *S.Ct.* 2135 (1996). Namely, "whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." *Department of Revenue of Mont. v. Kurth Ranch*, 114 *S.Ct.* at 1947 n.21. See *United States v. Ursery*, 116 *S.Ct.* at 2140 n.1. The Supreme Court of New Jersey, in dismissing a criminal indictment which was prosecuted following the imposition of a penalty in a civil proceeding, held that a civil penalty which is not disproportionate to the government's damages and costs nevertheless bars a subsequent criminal prosecution on double

jeopardy grounds if there was a punitive intent to the penalty. *State v. Womack*, 145 *N.J.* 576, 584, 679 *A.*2d 606, 609-610 (1996); App. A, *infra*, pp. 6a-7a.

The New Jersey supreme court further held that the order of the civil and criminal proceedings was immaterial in determining whether double jeopardy bars imposition of both civil penalties and criminal punishment. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, p.7a. In *Womack*, the civil proceedings preceded the criminal prosecution and the state court ruled that double jeopardy required the dismissal of the criminal indictment unless the punitive aspects of the civil penalty could be removed. This decision is an unwarranted extension of the *Halper* decision and threatens the ability of the lower courts to pursue appropriate civil remedies without jeopardizing potential criminal prosecutions. Similar challenges are being raised with increasing frequency in the state and circuit courts and guidance is needed in this area. This Court's review is therefore warranted.

A. A Civil Penalty Which Is Rationally Related And Proportionate To The Government's Costs And Damages Does Not Constitute "Punishment" Under The Double Jeopardy Clause.

The Double Jeopardy Clause provides that "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life and limb." U.S. Const., Amendment V. This Clause protects against three harms: prosecution for the same offense after acquittal, prosecution for the same offense after conviction, and multiple punishment for the same offense. *United States v. Di Francesco*, 449 *U.S.* 117, 129 (1980); *North Carolina v. Pearce*, 395 *U.S.* 711, 717 (1969). The protection against multiple punishments prohibits the

Government from "'punishing twice, or attempting a second time to punish criminally for the same offense.'" *Witte v. United States*, 515 *U.S.* ___, ___, 115 *S.Ct.* 2199, 2204 (1995) (emphasis omitted), (quoting from *Helvering v. Mitchell*, 303 *U.S.* 391, 399 (1938)).

In *United States v. Halper*, 490 *U.S.* 435 (1989), this Court considered "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 443. The standard enunciated in *Halper* -- regarded by this Court as a rule of reason -- to ascertain whether a civil sanction constitutes punishment for jeopardy purposes is essentially one of proportionality:

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceedings bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's *damages* and *costs* to determine if the penalty sought in fact constitutes a second punishment. [*Id.* at 449. (emphasis added)].[2]

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[2]Applying this standard to the *Halper* case, this Court concluded that the statutory penalty of $130,000 was so disproportionate to the damages

(continued...)

However, in departing from fifty years of settled double jeopardy jurisprudence, this Court took considerable pains to emphasize the limited reach of the *Halper* opinion. Indeed, this Court specifically reaffirmed its prior holdings in *Helvering v. Mitchell*, 303 *U.S.* 391 (1938); *United States ex rel. Marcus v. Hess*, 317 *U.S.* 537 (1943), and *Rex Trailer Co. v. United States*, 350 *U.S.* 148 (1956), where no such accounting was required. *Halper*, 490 *U.S.* at 441-442.[3] The Court stated that the relevant teachings of *Mitchell*, *Rex Trailer*, and *Hess* is that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, . . . without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Halper*, 490 *U.S.* at 446. This Court cautioned that it was announcing a rule for

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[2](...continued)
sustained by the government as to necessitate a remission -- not, significantly, a dismissal -- of the penalty. *United States v. Halper*, 490 *U.S.* at 452.

[3]In *Mitchell*, the civil penalty was the amount of the taxes defrauded, plus 50%. In *Hess*, the civil penalty was $315,000, of which $112,000 reflected a sanction of $2,000 per count for 56 counts, and the remaining $203,000 represented double the actual damages. In *Rex Trailer*, the defendants fraudulently purchased five trucks under the Surplus Property Act of 1944 by claiming veteran priority rights to which they were not entitled. Recognizing that the actual damage caused by the defendants "was difficult if not impossible to ascertain" (*Halper*, 490 *U.S.* at 445, discussing the holding of *Rex Trailer*), the Court nevertheless sustained a civil penalty (imposed after a criminal conviction) of $10,000 ($2,000 per count for each of the five trucks) and likened this penalty "to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Rex Trailer*, 350 *U.S.* at 153. In this case, defendant's civil penalty was $5,000, a fixed penalty provided under statute. See *N.J. Stat. Ann.* 45:1-25, App. K, *infra*, p5/a.

the "rare case" in which "a fixed-penalty provision subjects a prolific offender to a sanction overwhelmingly disproportionate to the damage he has caused," so that the sanction "may not be characterized as remedial, but as a deterrent or retribution," and therefore "punishment" within the meaning of the Double Jeopardy Clause. *Id.* at 449.

The New Jersey supreme court applied the *Halper* proportionality test and found that the $5,000 penalty imposed in the civil proceedings did not "approach the grossly disproportionate level and is rationally related to the costs necessary to compensate the State." *State v. Womack*, 145 *N.J.* at 584, 679 *A.*2d at 610; App. A, *infra*, p.6a. For this reason the state court determined that no further examination of the actual costs underlying the civil action was even necessary. *Id.* Nevertheless, the state court held that a remand was necessary in order to determine whether the civil penalty imposed on defendant was intended to be punitive. *Id.*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a. If it was determined that the intent of the State and the court at the time the penalty was imposed was to punish defendant, then double jeopardy would bar the subsequent criminal prosecution, notwithstanding that the statutory fixed-penalty was not disproportionate to the costs and damages incurred by the government in the civil proceedings. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a.

The state court came to this far-reaching conclusion in response to the language in *Halper* which directs the lower courts to evaluate "the purposes actually served by the sanction in question" in determining whether a particular civil sanction constitutes criminal punishment and thus triggers double jeopardy protection. *State v. Womack*, 145 *N.J.* at 582, 679 *A.*2d at 609; App. A, *infra*, p.5a. The consent order in the civil matter differentiated between the $3,554.07 in

investigative costs and the $5,000 in civil penalties. App. G, *infra*, at pp. 47a-49a.[4] The state court found that the $5,000 penalty was not disproportionate to the government's costs and damages but stopped short of finding the penalty remedial because of the "labels" used in the civil judgment. *Womack*, 145 *N.J.* at 583-585, 679 *A.*2d at 609-610; App. A, *infra*, pp.6a-7a. As this Court recognized in *Halper* and *Kurth Ranch*, the labels attached to a particular sanction are not of paramount importance and do not control in a double jeopardy inquiry. *Halper*, 490 *U.S.* at 447-448; *Kurth Ranch*, 114 *S.Ct.* at 1945.

In *United States v. Morgan*, 51 *F.*3d 1105 (2d Cir.), *cert. denied* ___ *U.S.* ___, 116 *S.Ct.* 171 (1995), the United States Court of Appeals for the Second Circuit rejected an argument that a civil consent judgment constituted punishment because it divided the remedial and retributive penalties into two separate categories. *Id.* at 1115. The Second Circuit discounted the importance of a label and correctly applied a proportionality analysis to the civil sanction, finding that the what the government in actuality suffered in damages and expenses was not so divorced from the civil sanction as to constitute punishment. *Id.*

The New Jersey supreme court, rather than follow the approach of the Second Circuit and apply a proportionality analysis to ascertain the remedial nature of the civil sanction, instead decided that a remand was necessary to determine the intent of the government and the court at the time the civil penalty was imposed. *Womack*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a. If it was the intent of the State

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[4]It appears that the civil consent order separated "investigative costs" from other "civil penalties" because of the way the Medical Practices Act is structured. App. K, *infra*, pp.52a-53a.

and the court to punish defendant, then double jeopardy would bar the subsequent criminal prosecution, notwithstanding the proportionality of the civil penalty to the government's costs and damages. *Id.*

In reaching this conclusion, the state court replaced the objective test for determining the purposes actually served by the civil sanction with one that focuses on the subjective intent of the government and the court. See *Halper*, 490 *U.S.* at 447 n.7. (Whether a sanction constitutes punishment is not determined from the defendant's perspective because "even remedial sanctions carry the sting of punishment"). As stated by Justice Kennedy in his concurring opinion in *Halper*,

> Today's holding . . . constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to be behind a given judicial proceeding. . . . Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name.

*Id.* at 453. Cf. *Whren v. United States*, ___ *U.S.* ___, 116 *S.Ct.* 1769, 1774 (1996) (subjective intentions play no role in Fourth Amendment probable cause analysis).

The decision of the New Jersey supreme court appears to be based upon a misconception that *Halper* set forth two tests for determining whether a civil penalty constitutes punishment for double jeopardy purposes. One test examines the proportionality of the civil penalty imposed in relation to the government's costs and damages in determining whether it rises to the level of punishment for double jeopardy protection. The second test looks to the intentions of the parties in imposing the penalty to determine if there was a punitive intent. *Womack*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a. Thus, even if the civil penalty was rationally related and not disproportionate to the government's costs and damages, which should end the double jeopardy analysis under *Halper*, under the New Jersey supreme court's interpretation of *Halper* the civil penalty could still constitute punishment and bar the subsequent criminal proceedings if there was a punitive intent to the penalty. *Id.*

This case emphasizes the difficulty the state and federal courts are having in reconciling the explicit holding in *Halper* ("defendant who has already been punished in a criminal prosecution may not be subjected to additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution") with the conflicting dictum which precedes it ("civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment"). *Halper*, 490 *U.S.* at 448-449. See *S.E.C. v. Bilzerian*, 29 *F.*3d 689, 696 n.11, 308 *U.S. App. D.C.* 43, 50 n.11 (D.C. Cir. 1994); *Matter of C.M.J.*, 915 *P.*2d 62, 67 (Kan. 1996); *State v. Young*, 544 *N.W.*2d 808, 811 (Neb. 1996); *State v. Hanson*, 543 *N.W.*2d 84, 87-88 (Minn. 1996); *State v. Hansen*, 542 *N.W.*2d 424, 432 (Neb. 1996); *State v.*

*Hickam*, 668 *A.*2d 1321, 1325-1327 (Conn. 1995); *State v. Carpenter*, 541 *N.W.*2d 105, 110 (Wis. 1995); *State v. Jones*, 666 *A.*2d 128, 141 (Md. 1995); *Moser v. Richmond County Bd. of Com'rs*, 428 *S.E.*2d 71, 73 (Ga. 1993). Supreme Court precedent does not provide clear guidance on this issue because this Court applied the "solely remedial" test in *United States v. Austin*, 509 *U.S.* 602, ___, 113 *S.Ct.* 2801, 2806 (1993), and the "solely deterrent/retribution" test in *Kurth Ranch*, 114 *S.Ct.* at 1945. This Court's recent opinion in *Ursery*, 116 *S.Ct.* at 2145 n.2, indicates that different views on this subject exist among the members of the Court. See *Ursery*, 116 *S.Ct.* at 2152-2163 (Stevens, J., concurring/dissenting).

The opinion of the New Jersey supreme court in this case will affect how other states address the double jeopardy concerns raised in light of *Halper*. Similar issues have been raised in other states with differing results and dissenting opinions. The Supreme Court of New Jersey is a respected court whose opinions carry authoritative weight which are often considered by other courts looking for guidance in analyzing difficult issues. The situation presented in *Womack* was not the "rare case" envisioned by this Court in the *Halper* opinion; nevertheless, a double jeopardy violation was established by the imposition of an ordinary single fixed-penalty which was not disproportionate to the government's costs and damages. See *Halper*, 490 *U.S.* at 449. The opinion of the New Jersey supreme court will serve only to further complicate and confuse the double jeopardy analysis under *Halper*. This Court's review is necessary to provide guidance to the lower courts, which are struggling with the ramifications of the *Halper* opinion with increasing frequency and conflicting results.

B. Defendant Was Not Placed In "Jeopardy" As A Result Of The Consumer Affairs Proceeding; Therefore The Double Jeopardy Clause Did Not Bar His Subsequent Criminal Prosecution.

In this case, the civil consumer affairs proceeding against defendant for unlicensed practice of medicine preceded his criminal prosecution for practicing medicine without a license. The New Jersey supreme court, like the majority of jurisdictions which have considered the question, determined that the order of the criminal and civil proceedings was not material in determining whether Double Jeopardy protections were applicable.[5] *Womack*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, pp.7a-8a. This case gives the Court the opportunity to address a question left unresolved in *United States v. Ursery*, ___ *U.S.* ___, 116 *S.Ct.* 2140 n.1 (1996), regarding whether the order of the criminal and civil proceedings has any significance in the double jeopardy analysis and the appropriate remedy for any violation.

In *Halper*, the criminal prosecution preceded the civil proceedings; thus there was no question that jeopardy attached once the criminal action commenced. In this case, however, the order of the proceedings was the reverse from *Halper* in that the civil action preceded the criminal prosecution.

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[5]*United States v. Morgan*, 51 *F.*3d 1105, 1113 (2d Cir.) *cert. denied*, ___ *U.S.* ___, 116 *S.Ct.* 171 (1995); *United States v. Furlett*, 974 *F.*2d 839, 843 n.2 (7th Cir. 1992); *United States v. Sanchez-Escareno*, 950 *F.*2d 193, 200 (5th Cir. 1991), *cert. denied*, 506 *U.S.* 841 (1992); *United States v. Walker*, 940 *F.*2d 442 (9th Cir. 1991); *United States v. Bizzell*, 921 *F.*2d 263 (10th Cir. 1990); *United States v. Mayers*, 897 *F.*2d 1126, 1127 (11th Cir.), *cert. denied* 498 *U.S.* 865 (1990).

Defendant was not placed in "jeopardy" when the Department of Consumer Affairs sought injunctive relief against him for practicing medicine without a license. Since defendant was not previously placed in jeopardy for prosecution purposes, there should have been no bar to a subsequent criminal prosecution.

Indeed, it must be emphasized that the *Halper* opinion is based upon the multiple punishment protection of the double jeopardy clause, not the multiple prosecution bar. In cases where the civil proceedings precede the criminal, the *Halper* multiple punishment prohibition should not prevent the criminal prosecution from going forward. It is premature to dismiss a criminal indictment which follows a civil proceeding because at that point the defendant has not been subject to multiple punishment under *Halper*. If the defendant is acquitted, then the multiple punishment issue is moot. If a conviction results, then the multiple punishment issue can be resolved prior to sentencing by a *Halper* proportionality determination. Thus, in cases where criminal indictments follow civil proceedings any motion to bar the criminal proceedings on *Halper* double jeopardy grounds should not be cognizable until after the criminal process has resulted in a conviction. This method of analysis will limit the number of interlocutory appeals on the *Halper* double jeopardy issue.

In this case, while the state court dismissed the criminal indictment on double jeopardy grounds, it further indicated that the indictment could be reinstated if the punitive portion of the civil judgment was returned to defendant. *Womack*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra, p.8a.* Since the state court found that the civil penalty was not disproportionate under *Halper*, the indictment could be reinstated only if it was determined that the government and the court had no intent to punish defendant when the civil

consent judgment was entered. *State v. Womack*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-9a. If there was a punitive intent to the $5,000 penalty, then the criminal prosecution could proceed only if the $5,000 was returned to defendant. *Id.*, 145 *N.J.* at 585-586, 679 *A.*2d at 610-611; App. A, *infra*, pp.8a-9a.

This case offers the Court the opportunity to address this recurring issue left unresolved in *Ursery* and provide needed guidance to the lower courts.

## CONCLUSION

For the foregoing reasons, petitioner requests that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
*Attorney for Petitioner*

CAROL M. HENDERSON
Deputy Attorney General
*Attorney of Record*

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